COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 046150-05

Derrick Jones — Employee
Southeastern Mechanical Services — Em
Ace American Insurance Company — Insu

Signed original

REVIEWING BOARD DECISI(
(Judges Costigan, Horan and Fabric

The case was heard by Administrative Judge _____.

APPEARANCES

Seth J. Elin, Esq., for the employee
Sheila Annand Carey, Esq., for the insurer at hearing and on brief
James W. Stone, Esq., for the insurer on brief and at oral argument

COSTIGAN, J. The employee was severely injured in a motor vehicle accident while driving to his employer's job site. When tested at the hospital where he was taken by ambulance, the employee's blood alcohol concentration (BAC) was 0.16%. Finding the employee was injured by reason of his serious and wilful misconduct, the administrative judge denied the employee's claim as barred under the provisions of G. L. c. 152, § 27.[1] The employee appeals the judge's decision on three grounds: 1) the insurer did not sustain its burden of proving serious and wilful misconduct; 2) the judge's findings that the employee was impaired by alcohol and the impairment was a factor in the accident are unsupported by the evidence; and, 3) because he was a travelling employee entitled to round-the-clock coverage under the act, and his travel to the job site was compelled by his employer, his injuries are compensable under the act. For the reasons that follow, we affirm the decision.

The employee resides in Florida. On March 16, 2005, he flew from Tampa

[1] General Laws c. 152, § 27, provides, in relevant part:

> If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation....

Airport to Logan Airport in Boston, Massachusetts, to work as a welder at the employer's facility, an incinerator in Haverhill, Massachusetts. Upon arrival in Haverhill, the employee checked into his assigned hotel, and went to sleep around midnight. The next day, the employee did not feel well, and he did not know when he was scheduled to work. He assumed he was on the day shift. At some point, he left the hotel and drove to the incinerator, using provided directions, but could not find the supervisor. The employee returned to the hotel, tried unsuccessfully to contact the supervisor again, and took a nap. Assuming he would be going to work the next morning, the employee went out and purchased a pizza, a sub sandwich, a six-pack of beer, and a pint of bourbon. (Dec. 9.) The employee ate the food, drank the pint of bourbon and three or four twelve-ounce beers and, at 5:00 p.m., took another nap. (Dec. 10.)

At 9:00 p.m., the employee was awakened by his fellow worker and roommate, who informed the employee he was supposed to be at work. The employee got dressed and proceeded to drive to the incinerator. In the dark, he could not find his way there. He ended up driving around, and calling his girlfriend. Shortly after the telephone call, the employee drove off the highway -- the Ward Hill Connector -- at a sharp exit ramp onto Route 495. He had been travelling at a high rate of speed, and the road was not well lit. Had he continued straight on the Connector, he would have reached the incinerator. The judge found, "the employee was either unable to stay on the road going straight or decided to take the exit ramp at too great a rate of speed and was unable to navigate the right turn." The judge further found the employee's car left the roadway, traveled about 150 feet into a wooded area, and rolled over, resulting in severe bodily injuries to the employee. (Id.)

The employee was taken by ambulance to Caritas Holy Family Hospital in Methuen and then transferred to Brigham and Women's Hospital in Boston. Blood alcohol tests were performed at both facilities. The judge adopted the opinion of the employee's expert that the sample taken at Holy Family showed a blood alcohol level of 0.16%, and the sample taken at Brigham and Women's two hours later showed a

0.13% BAC. The levels were consistent with the employee's reported alcoholic intake prior to 5:00 p.m. The judge found, and the employee does not dispute, that the legal blood alcohol limit for operating a motor vehicle in the Commonwealth of Massachusetts is 0.08%,[2] above which level it is presumed the operator is legally impaired, in violation of the criminal statute. (Dec. 10-12.)

The judge found that:

> The accident may have been caused by a number of factors. There is no way of quantifying the relative degree of the importance of these factors. It was dark. The employee was unfamiliar with the route. The road was poorly lit. The road is a fast road which requires a driver to slow down if it is their [sic] intention to take the off ramp. Signage was limited. The employee may have been distracted by his call to his girlfriend and his frustration with not finding the incinerator. I reject the argument that the employee was exhausted. He had not worked in several days and had slept the night before and most of the day of the injury. I also reject the argument that the road was icy. Officer Miller did not observe any icy conditions and it had not snowed for several days and the daytime temperatures were in the mid 40s. The employee['s] expert opines and I find that "at a BAC slightly higher than 0.16%, it would be expected that Mr. Jones would have been impaired by alcohol and that this impairment would have been a significant factor in the accident." After considering all of the testimony and analyzing the exhibits I find that the employee's intoxication was in fact a significant factor in the accident. The main road was straight and the exit ramp clearly required a driver to slow down. The employee did not come close to making the exit. He was traveling at a high rate of speed off of the road and into the woods. Even with the factors of the dark and unfamiliar place this would not cause an unimpaired person to have such a horrendous accident. I find that if the employee was confused it was in large part due to his impairment that was "significant." I

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[2] In fact, the statute provides that operation of a motor vehicle *at* or above a BAC of 0.08% is punishable. General Laws c. 90, § 24(1) (a)(1), provides, in pertinent part:

> Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight of alcohol in their blood *of eight one-hundredths or greater*, or while under the influence of intoxicating liquor . . . shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

(Emphasis added.)

> find causation between the impairment due to alcohol consumption and the accident.

(Dec. 11- 12.) The judge determined the employee's decision to operate a motor vehicle in such a legally impaired condition constituted serious and wilful misconduct, barring him from entitlement to workers' compensation benefits. (Dec. 12-13.) We address the employee's challenges to that finding.

Serious and Wilful Misconduct: The Burden and Standard of Proof

The employee's argument that the decision is arbitrary, capricious and contrary to law, stumbles out of the gate. While he correctly asserts the insurer bears the burden of proving his serious and wilful misconduct,[3] the employee falters in his contention that such proof must be "beyond a reasonable doubt." (Employee br. 15, 20.) Not surprisingly, the employee offers no case law which supports the proposition that this criminal standard of proof applies in civil cases such as workers' compensation claims. The proof of serious and wilful misconduct requires a showing of "quasi-criminal" conduct, which is,

> much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury *or with a wanton and reckless disregard of the probable consequences.*

Scaia's Case, 320 Mass. 432, 433-434 (1946), quoting from Burns's Case, 218 Mass. 8, 10 (1914). (Emphasis added.) Based on the facts he found, it is apparent the judge applied the "wanton and reckless disregard" standard to the employee's actions. However, the quasi criminal nature of the misconduct under §§ 27 and 28 does not, as the employee argues, raise the standard of proof applicable to proceedings under c. 152 beyond the civil "preponderance of the evidence" standard. Cf. Valachovic v. Big Y Foods, 19 Mass. Workers' Comp. Rep. 134, 137 (2005)("a major" causation under § 1(7A) needed to be proved only by preponderance of the evidence, that work

[3] Section 27 "is an affirmative defense, and therefore the insurer carries the burden of proving the employee was guilty of serious and willful misconduct." Yassin v. Gennaro's Eatery, 18 Mass. Workers' Comp. Rep. 237, 239 (2004).

injury "more likely than not" remained a major cause). Thus, we consider whether the evidence the judge deemed persuasive was preponderant.[4]

The Evidentiary Record

The employee argues that, as a matter of law, the judge could not find "serious and wilful misconduct" on the record evidence. We disagree.

> "The question whether an employee's . . . [injury] was caused 'by reason of . . . [his] serious and wilful misconduct . . .' is one of fact," Diaduk's Case, 336 Mass. 5, 7 (1957), and necessarily depends in each instance on the particular facts of the case presented.

Thayer's Case, 345 Mass. 36, 40 (1962). Here, the judge's decision evinces clear and appropriate fact-finding, anchored in the evidence. It is undisputed that when examined at the hospital an hour after the motor vehicle accident, the employee had a blood alcohol level of 0.16%. The judge adopted the *employee's* expert's opinion that "[a]t a BAC slightly higher than 0.16%, it would be expected that Mr. Jones would have been impaired by alcohol and that this impairment would have been a significant factor in the accident." (Dec. 11; Employee Ex. 19, 5.) While the fact of the employee's intoxication did not *require* a finding that the motor vehicle accident, and his related injuries, resulted from the intoxication, Eldridge's Case, 310 Mass. 830 (1941), the evidence adopted by the judge was sufficient to *permit* him to so conclude.

Moreover, the employee's first BAC level was over twice the legal limit. See footnote 2, supra. By statute, this fact gives rise to a permissible inference he was under the influence of intoxicating liquor at the time of the accident. See G. L. c. 90, § 24 (1)(e).[5] That the Commonwealth did not prosecute the employee criminally is

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[4] It is noteworthy that the statement of "Facts" set forth in the employee's brief consists entirely, and improperly, of citations to the testimony of the employee and certain other witnesses. (Employee br. 5-14.) It is devoid of citations to the subsidiary findings of fact made by the judge. (Dec. 7-12.)

[5] General Laws c. 90, § 24(1)(e), as amended by St. 1994, c. 25, § 5, and in effect on the date of the employee's motor vehicle accident, provides, in pertinent part:

> In any prosecution for a violation of paragraph (a), evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood . . . shall be admissible and deemed

irrelevant to the reality of his condition at the time of the accident. A finding of serious and wilful misconduct does not require a conviction of a crime.[6] However, an act which would give rise to a permissible inference of intoxication, and thus sustain a conviction under the criminal laws of the Commonwealth -- beyond a reasonable doubt, no less – amply, and logically, supports a finding that the employee had engaged in serious and wilful misconduct for the purposes of § 27. See Murphy v. Star Contrs., Inc., 17 Mass. Workers' Comp. Rep. 653, 657 (2003)("To state the obvious, an assault and battery is not just 'quasi-criminal' behavior, it is a crime!

> relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor. . . . If such evidence is that such percentage was five one-hundredths or less, there shall be a permissible inference that such defendant was not under the influence of intoxicating liquor; . . . and if such evidence is that such percentage was eight one-hundredths or more, there shall be a permissible inference that such defendant was under the influence of intoxicating liquor.

The judge wrote: "It is illegal to operate a motor vehicle while impaired and *it is presumed* that an operator is impaired with a blood alcohol concentration of 0.08% and above." (Dec. 12; emphasis added.) In fact, the presumption of impairment provision was removed from the statute in 1994, in favor of a permissible inference provision. However, given the judge's express adoption of the employee's expert's opinion that with a BAC of slightly higher than 0.16%, (Dec. 11), the employee would have been impaired, i.e., under the influence of intoxicating liquor, we consider his statement concerning presumption of impairment to be harmless error.

[6] The employee relies heavily on the testimony of Officer Harry Miller, one of the first responders to the scene of the accident. Officer Miller testified he did not suspect alcohol played a role in the accident, given the dangerousness of the road configuration at that exit onto Route 495, and the necessity of slowing from the fifty-five miles per hour speed limit to about twenty-five miles per hour for safe exit onto the ramp. (Employee br. 19, 23-25.) Again, the employee offers us no citation to case law which trumps the judge's right to weigh, and reject, Officer Miller's opinion as to what caused the accident. The judge was well within his authority to determine the persuasiveness of the evidence before him. See Sowle v. Department of Wildlife and Fisheries, 20 Mass. Workers' Comp. Rep. 377, 382 (2006)(judge, as fact-finder, is solely responsible for deciding weight to be given testimony). In any event, Officer Miller testified he "wasn't able to get up close enough to [the employee] to smell his breath or the odor emitting from his body. There was a lot [sic] of emergency medical technicians around him." (July 25, 2008 Tr. 125.) He also testified that if he had known the employee, at the time of the crash, had a blood alcohol content of 0.16% or slightly above, he would have summonsed the employee to face a complaint of operating under the influence. (Id. at 48-49.)

That a criminal complaint did not issue on behalf of the *perpetrator* does not advance the analysis.") (Emphasis in original.)

Citing our decision in Dupuis v. Phillip Beaulieu Home Improvement, 19 Mass. Workers' Comp. Rep. 33 (2005), the employee suggests the reviewing board followed the "rule" set out in Caron's Case, 351 Mass. 406, 410 (1966), "that finding an employee had been drinking did not prevent an award of compensation benefits." (Employee br. 18.) The employee utterly misconstrues the holding in Dupuis, wherein the board affirmed the administrative judge's finding of serious and wilful misconduct:

> While the employee is correct in citing Eldridge's Case, 310 Mass. 830 (1941) . . . that intoxication of the employee does not *require* a finding that the injury resulted from the employee's intoxication, in this case I am persuaded that in fact the intoxication did result in Mr. Dupuis' fall and injury. In this I follow the law as suggested in In re Von Ette, 223 Mass. 56, 59 (1916) where the Supreme Judicial Court suggests that if the employee fell from the roof due to a condition of intoxication, he would not be entitled to compensation.

Dupuis, supra at 34-35. (Emphasis added.) The employee further relies on Eldridge's Case, supra, for the proposition that intoxication *cannot* be the reason for a finding of serious and wilful misconduct under § 27. Again, his reliance is misplaced. "And the evidence did not *require* a finding that the injury resulted from the employee's being under the influence of alcoholic liquor. An affirmative finding to the contrary *was permissible* on the evidence." Id. (Emphases added.)

The Course of His Employment

At hearing, the insurer disputed the employee was in the course of his employment at the time of the accident. (Dec. 12.) The employee argued then, and does so now, that he was a travelling employee, entitled to coverage,

> around the clock for reasonable and foreseeable activities . . . [such as] reasonable travel to or from assignments as part of work, eating or sleeping that was anticipated and related to the employment. The test is whether the activities are "impelled by the nature and conditions of employment. . . ." See Frassa v. Caulfield, [22 Mass. App. Ct. 105 (1986)] at 110.

Cahalane v. FMR Corp., 10 Mass. Workers' Comp. Rep. 495, 496 (1996). The employee further contends that because he was driving from the hotel to the incinerator job site at the direction of his employer, his injuries from the accident are compensable under § 26, which provides, in pertinent part:

> If an employee . . . receives a personal injury arising out of . . . an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer . . . he shall be paid compensation by the insurer . . . as hereinafter provided.

General Laws c. 152, § 26. The judge determined he did "not have to reach these issues due to the finding" of serious and wilful misconduct, i.e., the employee was travelling "at a high rate of speed" when his car left the road, (Dec. 10), and he "chose to operate a motor vehicle in violation of law, endangering himself and others, and causing himself severe personal injury." (Dec. 12.)

Contrary to the judge's statement, implicit in his finding that the employee engaged in serious and wilful misconduct, was a determination the employee was in the scope of his employment when the accident occurred:

> Under [§ 27] and every decision which has construed its provisions, an employee's serious and wilful misconduct, the wrongful activity in which he engages, must arise in the context of the employment situation and must relate to the performance of the work for which he was hired or to an activity incidental to and not inconsistent with his employment. [Footnote in original: "See, e.g., Morris's Case, 354 Mass. 420 (1968); Caron's Case, 351 Mass. 406 (1966); Pearson's Case, 341 Mass. 576 (1960); and Hamel's Case, 333 Mass. 628 (1956)"]

Houeiss v. Zahle, Inc., 4 Mass. Workers' Comp. Rep. 247, 251 (1990), aff'd Houeiss's Case, No. 90-J-686 (Mass. App. Ct. [single justice] May 23, 1991).[7] In

[7] At hearing, the judge revealed his view of the scope of employment issue:

> The Court: . . . I'm not sure any of this makes a whole lot of difference, by the way, because the Employee was a travelling employee. He would be -- it would be compensable no matter what he was doing, whether he was instructed to be going [to the incinerator] or not. The real issue is the serious willful [sic] aspect of it as to whether he should have gone at all.

other words, had the judge determined the employee was outside the scope of his employment when the accident occurred, the insurer's affirmative defense under § 27 would have been irrelevant -- an issue that need not have been reached and decided.

The judge's findings as to the employee's state of intoxication, resulting impairment, and driving recklessly at a high rate of speed, amply support his conclusion that the employee's conduct fell within the § 27 bar to compensation. "With proper deference to the judge, whose job is to weigh and assess the credibility of the evidence, and to determine the factual question of whether the employee was injured" by his own serious and wilful misconduct, Drumm v. Viale Florist, 21 Mass. Workers' Comp. Rep. 249, 254 (2007), rev'd on other grounds, Drumm's Case, 74 Mass. App. Ct. 38 (2009), we affirm the decision.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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Ms. Carey:	Well, there is a question, your Honor, actually, because he was actually in Massachusetts. I understand he's a travelling employee by nature, but once you come in the bubble of Massachusetts, you have a fixed place of residence, kind of where his hotel was, to a fixed place of employment.
The Court:	I don't buy that at all. I think he could almost have had almost any kind of incident in Massachusetts and have it be compensable.
Mr. Elin:	Your Honor, in my interpretation of the law --
Ms. Carey:	Judge, Cahalane says --
Mr. Elin:	-- the second you're over the line --
The Court:	We can argue that in the briefs, but most – I'm not sure that it's totally relevant.

(June 5, 2008 Tr. 203-204.)